

Anne Orford. *International Authority and the Responsibility to Protect*.

Cambridge: Cambridge University Press, 2011. Pp. 235. \$40.

ISBN: 9780521199995.

Rwanda's three-month 1994 genocide that killed 800,000 people was not prevented due to a failure of political will, not lack of military capacity. Then in Kosovo in 1999, NATO did take forceful action in the name of humanitarian intervention, but without UN authorization. Both incidents triggered legal and political controversies, as a consequence of which Secretary-General (SG) Kofi Annan pushed for a new doctrine which would allow the international community to take timely and effective action against humanitarian atrocities.

In 2001 the International Commission on Intervention and State Sovereignty (ICISS) formulated the innovative principle of the responsibility to protect (R2P)¹ that spoke eloquently to the need to change the UN's normative framework in line with the changed reality of threats and victims of the new century. Building on its report, in 2005, world leaders unanimously agreed that all states had the responsibility to protect people living in their territorial jurisdictions. Where governments were manifestly failing in their sovereign duty, the international community, acting through the UN, would take 'timely and decisive' collective action to honour the international responsibility to protect people against atrocities. R2P is the normative instrument of choice to convert a shocked international conscience into effective collective action. It navigates the treacherous shoals between the Scylla of callous indifference to the plight of victims and the Charybdis of self-righteous interference in others' internal affairs.

In 2011, Libya became the setting for the first application of the sharp edge of the new principle-cum-norm of the responsibility to protect through a UN Security Council-authorized international military intervention. While the military enforcement of the no-fly and no-drive zones by the North Atlantic Treaty Organization (NATO) allies was mainly a successful application of R2P, it also generated considerable controversy over allegations that NATO exceeded the limitations set on the international intervention by SC Resolution 1973.

R2P can be discussed as an analytical concept and studied with respect to its philosophical antecedents, theoretical coherence, and tensions and inconsistencies. Much of the scholarly criticisms directed at R2P over the past decade reflect this academic bias of evaluating R2P as an analytical concept. Alternatively, it can be evaluated as an action-oriented normative project that seeks to codify and shape international precepts and world order in order to realize the core UN values of a better and safer life for all peoples.

Ban Ki-moon, Annan's successor as UN chief, identified himself closely with R2P, appointed a special adviser to develop and refine the principle, and articulated an agenda to convert R2P from promise to practice. Orford's singular contribution is to turn that understanding on its head, by arguing that R2P processed UN deeds from 1945 to 2001/2005 into words. The ICISS report itself had grounded R2P, among others, in 'state practice [and] Security Council precedent'.² Orford takes this a lot further.

She argues, convincingly, that the philosophical roots of R2P are to be found in the dilemma of political authority in times of civil war and revolution. The dilemma has been a recurring feature of European history and as such it has preoccupied the minds of some of the leading political and legal theorists. In responding to the dilemma, many have grounded claims to authority in the capacity and willingness to provide security and protection to the population. Orford's survey of the broad sweep of European history includes the Protestant revolutions of early modern Europe, the bourgeois and communist revolutions of the 20th century, and the post-1945 decolonization revolution. The efforts of the United Nations in the last revolution,

¹ *The Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty (2001). Disclosure: I was an ICISS Commissioner.

² *Ibid.*, at 16.

under the leadership of the organization's second Secretary-General Dag Hammarskjöld in particular, are thus situated in a broad historical and jurisdictional context.

Orford argues that as the European colonial powers retreated from empire they left behind a power vacuum that posed a threat to the law and order of many newly independent countries and to the physical safety and security of their people. The resulting instability also posed a potential threat to international peace and security and risked the intervention of major powers on opposing sides, thereby importing the global Cold War rivalry into local intrastate conflicts. Hammarskjöld used the authority of the new international organization to initiate several innovative practices both to underwrite public order and to protect the safety and security of the people. Had he attempted to provide theoretical justifications for his growing body of practices in internal governance as an essential prop of international order, he might well have encountered significant opposition and resistance to the efforts to encroach upon sovereign domestic jurisdictions. Rather than risk a doctrinal defeat, he quietly expanded the range of activities in the field without ever confronting the thorny issue of the UN's legal authority to engage in such activity. At the end of the last century, probably the most famous example of this was the claim that the innovative institution of UN peacekeeping – the consensual use of military troops as a peaceful interpository force between two enemy armies – had its legal basis in Chapter 6.5, halfway between the consent-based international engagement with a dispute under Chapter 6 of the Charter and coercive international action under the enforcement powers of Chapter 7.

This description of the growth of UN practices in underwriting domestic order and public safety as a prerequisite to the maintenance of international peace and security allows Orford to flip the dominant assumption in the debates over R2P in this century. Most analysts have accepted Ban Ki-moon's contention that R2P was an innovative principle articulated by an independent international commission in 2001 and endorsed unanimously by 150 world leaders at the UN summit in 2005. The challenge for the United Nations, according to Ban, is to convert the principle into action, to move from words to deeds. In reality, Orford argues, R2P's singular achievement was to provide a theoretically coherent account of international authority that successfully integrated the Hammarskjöld-led body of dispersed practices in the wake of decolonization.

Orford's thesis is challenging, but she is more than up to the challenge. She develops and documents her central argument through (1) a detailed description of the unprecedented UN practices in the Suez crisis in 1956 and the Congo civil war in the 1960s, (2) the answer to the problem of authority in the midst of civil war given by the English philosopher Thomas Hobbes, and (3) the answer to the problem of protection in uncertain times given by the German political theorist Carl Schmitt. Just like R2P today, these practices and theories were concerned with locating the correct balance between legitimate authority, executive action, and general civilian protection. Orford concludes by outlining many of the remaining challenges that are inherent in the normative project of assuring protection through international institutions when domestic governance mechanisms prove inadequate, including questions of agency and the proper limits to international action.

Orford succeeds in her central task. But this is not to say that all questions are answered, or that fresh questions are not raised, or that the interpretation and analysis is correct in every last detail and nuance.

In the decades after World War II, which coincided with the main period of decolonization as European empires crumbled and retreated from around the world, the UN steadily expanded the range of executive actions it undertook to fill actual or anticipated power vacuums in several newly-independent countries. These 'practices of governing' were not always accompanied by clearly articulated forms or bases of authority. Instead, it fell to ICISS to provide 'a detailed normative articulation' of the 'international authority to undertake executive action for protective ends' (at 1). R2P is therefore first and foremost an attempt to integrate existing and evolving but dispersed practices of protection into a conceptually coherent account of international authority.

Orford relies a great deal on SG Dag Hammarskjöld's conception of the UN's proper role in filling power vacuums left behind by collapsing colonial empires, and the actions he undertook to this end. Extending the role of the SG well beyond a mere chief administrative officer into dynamic executive actions, he justified a special and rapidly growing role for the organization by its neutrality, impartiality, and technical competence. On the one hand, this meant that the UN – and the SG as its chief representative and spokesperson – were not encumbered by the baggage of special (national or bloc) interests which guided the actions of individual member states. The UN was somehow above the fray of the political contest being waged, often by brutally violent means, by the local conflict parties and outsiders who provided them with diplomatic support and military assistance. On the other hand, this neutrality permitted – perhaps even obligated – the UN led by the SG to step in as a mediator and facilitator between the warring factions.

The striking feature of Hammarskjöld's creative extension and boundary-stretching reinterpretations of the UN Charter was just how far he was able to go in actions – deeds – without having to justify the action with respect to the relevant enabling Charter clauses. The scope and frequency of UN executive action, with Hammarskjöld at the helm, were expanded without doctrinal clarification, Charter amendments, or treaty negotiation.

The tensions that were inherent in Hammarskjöld's broadening conception and practice of UN executive action, but kept dormant by the genius of his personality and diplomatic skills, could no longer be contained with respect to the UN's expansive responses to the more complex humanitarian emergencies after the end of the Cold War. The only too public setbacks and flaws of UN actions in Somalia, Rwanda, the Balkans, and East Timor raised questions about the organization's authority, credibility, and legitimacy with pressing urgency. The most acute manifestation of this was the intense controversy generated by the so-called challenge of humanitarian intervention. It fell to ICISS, according to Orford, to step into the normative breach and provide the theoretical justification for the accumulated body of practices bequeathed by Hammarskjöld. It is in this sense that Orford puts forward R2P as a theory of common – that is shared and pooled – international authority to justify the exercise of international governance functions by the UN as an independent (or Hammarskjöld's neutral and impartial) actor.

Orford buttresses her thesis with chapters on Hammarskjöld's thoughts and actions in the Suez and Congo crises in 1956 and 1960 respectively, and with reference to the works of political philosophers Thomas Hobbes and Carl Schmitt. Writing in the context of the religious civil wars and the challenge they posed to secular state authority, Hobbes justified absolute obedience to the state with reference to its protective function. Schmitt was interested in the problem of order in Germany in the devastating aftermath of World War I. The importance of tracing the intellectual roots of R2P in their writings, and the specific historical circumstances in which they wrote, is that it points to the dangers of absolutist power. In order to avoid that, Orford argues, the institutionalization of R2P must simultaneously legitimize new forms of authority and set out proper limits to such authority.

There is another respect in which R2P represents a continuum from Hammarskjöld's conception of the UN. Just as his notions of preventive diplomacy and peacekeeping were meant to avert great power intervention by inserting the UN as a neutral presence, so R2P came about in opposition to efforts to justify interventions by non-UN coalitions of the willing led by powerful states. It is a deliberate substitute for imperial visions and governance practices (at 32). Hammarskjöld's refusal to confront the reality of the collapse of state authority in Congo meant that he stubbornly resisted answering a fundamental question. If the UN was intervening with force, whose law and whose authority would it be upholding if not its own? The same dilemma was to haunt the humanitarian interventionists around the turn of the century. The logic of Hammarskjöld's conception and legacy of practices with respect to UN executive action was to culminate at the turn of the 20th century in international administrations in the Balkans and East Timor.

As David Kennedy has argued, ‘The effort to intervene . . . without affecting the background distribution of power and wealth betrays this bizarre belief in the possibility of an international governance which does not govern.’³ Orford makes broadly the same argument as Kennedy, that international interventions, far from being above worldly interests and ideologies, can determine the winner among the rival claimants to authority (at 195). Informed by a new global managerialism, international authority reaches deep into domestic jurisdictions to rearrange relations between the state, rulers, and people with reference to external normative benchmarks.

The third component of the ICISS version of R2P, the responsibility to rebuild, at least tries to come to grips with this question. Hammar skjöld had preferred to operate with ‘a very broad mandate . . . guided by a minimalist set of principles’ (at 87). He had the skills but also the structural conditions of the two-bloc Cold War to be able to exploit the margins and use equivocation ‘in the service of virtue’, as his aide Conor Cruise O’Brien put it (at 88). In the more complex environment and challenges of the 1990s this was no longer sustainable, and R2P steps into the breach to provide the necessary principled underpinnings.

But has the United Nations moved too far in the opposite direction? Orford provides several examples from Kosovo and Timor of UN administrators overruling the preferences and policy choices of local leaders and parliaments. This is a belief in the superiority of technocratic legitimacy over local ownership and democratic legitimacy, of international actors wielding expansive powers while enjoying broad diplomatic immunities and privileges: power without responsibility and accountability (at 94–95). As Timor’s Jose Ramos-Horta comments, an analogous decision would have been to deprive Nelson Mandela of effective power during South Africa’s transition, with a UN super-official having the discretion to seek and heed Mandela’s opinion or not (at 101).

This is an elegantly written and convincingly argued book in its central thesis. Orford thinks clearly and writes well with an admirable economy of words. Norms, like words, have consequences, including institutional. If authority is grounded in protective functions, this will privilege certain kinds of institutions and actions over others. If R2P can displace state authority in the name of protecting people, what limits should be placed on international authority? It also raises questions that are not easily answered of agency and process. Who decides, based on what evidence, if and when the state is failing in its R2P obligations and who should take up the slack? How and for how long? And who will ensure that expansive international authority in turn is not abused?

The use of force, no matter how benevolent, enlightened, and impartial in intent, has empirical consequences, shapes the struggle for power, and helps to determine the outcome of that political contest. This is an argument that resonates in the wake of the controversial invocation of R2P in UN Security Council Resolution 1973 to protect Libyans from being massacred by Muammar Qaddafi.

The Libya outcome is a triumph first and foremost for the citizen soldiers who refused to let fear of Qaddafi’s thugs determine their destiny any longer. It is triumph secondly for R2P. It is possible for the international community, working through the authenticated, UN-centred structures and procedures of organized multilateralism, to deploy international force to neutralize the military might of a thug and intervene between him and his victims. NATO military muscle deployed on behalf of UN political will helped to level the killing field between citizens and a tyrant.

Nevertheless, the jury is still out on whether the NATO military action in Libya will lead to consolidation or delegitimization of the R2P norm. Resolution 1973 authorized military action to prevent civilian slaughter but not intervene in the civil war (any state has the right to use force to suppress armed uprisings), effect regime change, or target Gaddafi. The Libyans’ euphoria and NATO’s relief over the successful military campaign is likely to temper criticisms of the manner in which NATO rode roughshod over these explicit limitations.

³ D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 130.

Orford correctly notes that R2P operations will often entail decisions on recognition of rival claims to legitimate government. At the time that Qaddafi was ousted from Tripoli, only a handful of African countries recognized the Transitional National Council as the lawful government of Libya. The African Union did so on 20 September 2011. Thus R2P may not determine the status of sovereignty of any state, but it has significant implications for determining who gets to exercise that sovereignty and within what limits.

Hammarškjöld had been somewhat naïve and idealistic in believing that experience of the neutrality and impartiality of the UN would steadily increase understanding of and respect for its role (at 174). Instead there has been a paradoxical suspicion of the UN and its SG by influential US policymakers as being habitually opposed to American interests and values. At the same time many other countries are suspicious that the UN and the SG have been unduly captured by Washington and are wont to engage in pre-emptive appeasement of its wishes.

Orford writes of ‘the consensus position’ in the academic literature about the ‘*insignificance*’ of R2P (at 22, emphasis in original). This seems at odds with the ruddy health of the literature on R2P judging by the proliferation of books, book series, new journals, and articles in existing journals – not to mention graduate theses – on the subject.

Orford makes a major and important contribution to this rapidly growing literature on R2P. But there are two broad problems with her approach: an overloading of the concept and its confinement to third world contexts. Neither should be read as detracting significantly from her overall argument.

To a political scientist, it is interesting to note Orford’s comment that because R2P authorizes but does not mandate particular types of executive action, legal scholars believe that R2P imposes no new obligations on states or international organizations, ‘it has no normative effect’ and ‘introduces no conceptual innovation’ (at 25). She disagrees. Most political scientists are likely to share her judgment that R2P does have normative effect. As an enabling new norm, it confers additional authority. But because it is not an obligating new norm, it does not impose binding new duties.

Orford overloads R2P with the much broader and weightier agenda of international executive action in its totality. R2P’s remit is critical but quite narrow: the four atrocity crimes of war crimes, genocide, crimes against humanity, and ethnic cleansing. The preventive and rebuilding components are R2P-relevant to the extent that they bear on these four crimes. Beyond that, UN action pursued a development and peacebuilding agenda, but not R2P. Therefore it is not at all clear that R2P can bear the weight of providing a coherent normative justification for the full range of practices undertaken by the UN under the rubric of international executive action. Orford seems to have missed, or at least understates, the extent of administration fatigue within the UN organization. There is unlikely to be any enthusiasm for new experiments in international administration under the UN auspices on the scale of Kosovo and Timor anytime soon.

Orford misinterprets R2P in her claim: ‘[t]he argument that the lawfulness of authority depends upon the fact of protection serves to delegitimise those whose claim to power is based on tradition, on the capacity to realise spiritual ends or on the realisation of self-determination’ (at 192). The correct equation is not whoever can provide protection gets to rule. This may have been true for Hobbes and Schmitt, but is not true of R2P. Rather, do the lawful authorities, including those whose claim to power is based in these alternative principles of legitimation, have the will and capacity to protect? If the answer is in the affirmative, there is no R2P-type problem. If not, then they deserve to be challenged.

R2P is expansive in a second sense. It does not address the distribution of jurisdiction and authority among states, but between states and international actors (at 27). And while it preserves to states the responsibility to protect their own populations, it strengthens the UN’s responsibility for the international community as a whole. In her view, therefore, and in mine, R2P ‘represents one of the most significant normative shifts in international relations since the creation of the UN in 1945’ (at 41).

Orford's further argument that the lawfulness of state authority 'is grounded upon the capacity and willingness to protect the population' (at 44) is less convincing. R2P is too narrow to sustain her broad thesis beyond a point. Hammarskjöld's conception and practice of executive authority was far more ambitious and expansive than the limited remit of R2P as set out in paragraphs 138–140 of the 2005 outcome document. R2P is narrow – it applies only to the four crimes of ethnic cleansing, genocide, crimes against humanity, and war crimes – if deep: there are no limits to what can be done in responding to these atrocities. It does build on Hammarskjöld's legacy (at 106). It is part of the long process and normative project of reorganizing power (at 108). But to describe it as a conceptual and institutional effort 'to consolidate the new forms of authority that have emerged in the decolonised world through the expansion of executive action' (at 108) is a claim too far. It cannot on its own bear the weight of integrating a set of international governance practices 'into a coherent account of international authority' (at 108).

The overloading of R2P leads Orford into a further error, blaming R2P for '[t]he techniques of surveillance, police action and administration now being consolidated and integrated' that effectively 'have limited the capacity of decolonised states to realise self-determination, to redistribute property, to restructure authority and to exercise power over life and death' (at 208). But she is right to remind us that the movement from the ideal of protection to its implementation is inescapably political and therefore unavoidably contested.

The second broad difficulty of Orford's account is that, for reasons that are neither clear nor convincing, she repeatedly limits R2P to decolonized countries. The linkage is accurate enough in describing UN peacekeeping practices and diplomatic interventions under Hammarskjöld. But there are three problems with it when extended to R2P. First, it is a geographically erroneous. To the extent that the NATO intervention in Kosovo in 1999 was a major spur to the controversy over 'humanitarian intervention', the establishment of ICISS, and the formulation of R2P, this is not a decolonization-specific debate. Secondly, it is conceptually flawed. The key variable is not the post-colonial state but rather the failing, post-conflict, and civil war state.

Thirdly and most critically, I believe this leads her into the trap of thinking of the West as producers and developing countries as consumers of global norms: the norm-setters and norm-takers. This is not a trivial point of political correctness, but one that has significant political consequences in the world of international diplomacy. Developing country leaders view and support R2P as having universal application. They will resent and resist any effort to subvert it into a West versus the rest narrative. The salience of this comment will grow with the shift in global power and influence from the Atlantic to Asia and the Pacific. In addition to looking at key philosophical antecedents of R2P within the Western history of ideas, therefore, it would be extremely valuable to identify and examine African and Asian intellectual and political traditions on governance in which to ground the key tenets of R2P. How have their thinkers historically theorized the relationship between rulers and citizens and the restraints on monarchs for respecting the dignity and protecting the lives of subjects (many of which clearly anticipated modern-day international humanitarian law)? As Amitav Acharya has argued, many Asian leaders pursue a sophisticated mixed strategy of localizing some global norms but also exporting and universalizing some other local norms.⁴

Ramesh Thakur

Professor of International Relations, The Australian National University; Adjunct

Professor, Institute of Ethics, Governance and Law, Griffith University; ICISS Commissioner

Email: ramesh.thakur@anu.edu.au

doi: 10.1093/ejil/chs007

⁴ Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', 58 *Int'l Org* (2004) 239, and 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism and Rule-making in the Third World', 55 *Int'l Studies Q* (2011) 95.